85-1731

Supreme Court, U.S.
FILED
APR 15 1986
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No.

AUTOMOBILE CLUB OF MICHIGAN, AUTO CLUB INSURANCE ASSOCIATION, AUTO CLUB CASUALTY INSURANCE COMPANY, AUTO CLUB GROUP INSURANCE COMPANY, and AUTO CLUB LIFE INSURANCE COMPANY,

Petitioners,

v.

CLIFFORD ROBERTS, STANLEY SNYDER, FRANCIS DOUGLAS STEVENS, DOUGLAS P. CARLAN, DANIEL PICANO, JOHN ROBBINS, and CARL KOLP, On Behalf Of Themselves And On Behalf Of The Class Of All Sales Representatives Of The Defendants in the Counties of Wayne, Macomb and Oakland,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

KALVIN M. GROVE
STEVEN L. GILLMAN
FOX AND GROVE, CHARTERED
233 South Wacker Drive
Sears Tower—Suite 7818
Chicago, Illinois 60606
312/876-0500

ROBERT FINKEL
FINKEL, WHITEFIELD & SELIK
18860 West Ten-Mile Road
Suite 200
Southfield, Michigan 48075
313/559-8800

Attorneys for Petitioners

Pandick Midwest, Inc., Chicago • (312) 733-6000

QUESTION PRESENTED

After an employer and a union have reached a good faith impasse in collective bargaining, the National Labor Relations Act (the "NLRA"), 29 U.S.C. § 151 *et seq.*, permits the employer, as a self-help economic weapon, to unilaterally implement new employment terms consistent with its final bargaining offer. The question presented is whether, under the federal preemption doctrine, those new employment terms supersede individual state law implied contract rights created prior to the employees' selection of a union.

PARTIES TO THE PROCEEDING

The original parties to the proceeding are reflected in the caption. Subsequently, John Robbins withdrew as a party-plaintiff and Dennis McManus, Franklin Martin, and Ronald Demeter were added as party-plaintiffs. Class certification was not requested.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

Petitioners, Automobile Club of Michigan, *et al.* ("Auto Club"), respectfully pray that a writ of certiorari issue to review the judgment of the Michigan Court of Appeals entered on November 5, 1984. That decision became final for the purpose of review by this Court on January 15, 1986 when the Michigan Supreme Court denied petitioners' application for leave to appeal.

OPINIONS BELOW

The January 15, 1986 order of the Michigan Supreme Court is reported at 424 Mich. 867 (1986). A. 1-2. The decision of the Michigan Court of Appeals is reported at 138 Mich. App. 488 (1984). A. 3-17. Prior thereto, on April 12, 1983, the Michigan Court of Appeals had granted the Auto Club's application for leave to appeal a certified decision (A. 18-19) of the Wayne County (Mich.) Circuit Court. The Circuit Court's decision is not reported and is reprinted at A. 20-38.

JURISDICTION

The decision of the Michigan Court of Appeals issued on November 5, 1984 and became final, for the purpose of review by this Court, when the Michigan Supreme Court denied petitioners' application for leave to appeal on January 15, 1986. See *Belknap* v. *Hale*, 463 U.S. 491, 497 n. 5. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

STATUTE INVOLVED

The relevant provisions of the NLRA are set forth in the Appendix at A. 39.

STATEMENT OF THE CASE

The respondents are former sales representatives of the Auto Club. Considerably after the commencement of their employment, as the result of a National Labor Relations Board ("NLRB") election, the Michigan AAA Sales Association (the "Union") became their exclusive bargaining representative. A. 6. After certification of the Union, the Auto Club and the Union met numerous times to negotiate a collective bargaining agreement. A. 7. The Union's membership rejected the Auto Club's final offer in July, 1981. A. 7. As a result of this good

faith impasse in the negotiations, the Auto Club, as permitted under the NLRA, unilaterally implemented its final offer[1] on September 1, 1981. A. 7. One aspect of that final offer and, indeed, the central issue that had separated the parties during negotiations, was minimum production standards. Under those standards, a sales representative received an oral warning for failing to meet the minimum level in a particular month, followed in subsequent months by a written warning, probation, and termination/demotion if the individual failed to fulfill the standards in four consecutive months. In January 1982, 40 of 570 commissioned sales representatives, after receiving such progressive discipline, were terminated for failing to comply with the production standards. A. 7.

Neither the respondents nor their Union filed charges with the NLRB alleging that implementation of the employer's final offer constituted improper bargaining or alleging that either the adoption or enforcement of the standards was otherwise an unfair labor practice under the NLRA. Instead, respondents filed a state court class action on behalf of all employees represented by the Union. Predicated on *Toussaint* v. *Blue Cross and Blue Shield*, 408 Mich. 579, 292 N.W.2d 880 (1980),[2] they claimed that the unilateral implementation and enforcement of the minimum standards violated an alleged implied contract not to terminate without just cause created

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[1] See, *e.g.*, *Bi-Rite Foods, Inc.*, 147 N.L.R.B. 59 (1964).

[2] In the landmark *Toussaint* decision, the Michigan Supreme Court vitiated the common law employment at will doctrine. The court held that "employer statements of policy," whether oral or written, "can give rise to contractual rights in employees without evidence that the parties mutually agreed that the policy statements would create contractual rights in the employee. . . . No pre-employment negotiations need take place and the parties' minds need not meet on the subject. . . ." 408 Mich. at 613-615, 292 N.W.2d at 892.

prior to their selection of the Union. A. 7. The Wayne County Circuit Court denied the Auto Club's motion that the NLRA preempted state court jurisdiction, but certified the preemption question to the Michigan Court of Appeals. A. 18-19.

The Court of Appeals thereafter granted leave to appeal and affirmed. A. 6. The court framed the issue as "one of conflict between defendants' claim that implementing their final offer, which included the minimum performance standards, was an integral part of the collective bargaining process and plaintiffs' claim that the implementation of the minimum production standards was a breach of plaintiffs' pre-existing employment contracts under state law." A. 9. Based on its analysis of various decisions of this Court, the court concluded that the employer's right "to implement its final offer must be seen as limited by the employer's common-law duty to honor its contracts of employment" notwithstanding the "incidental effect on the collective-bargaining process." A. 15. The Michigan Supreme Court subsequently declined review. A. 1-2.

REASONS FOR GRANTING THE WRIT

This Court has heretofore been sensitive to potential state law incursions upon free collective bargaining. See, *e.g., Golden State Transit Corp.* v. *City of Los Angeles,* ____ U.S. ____, 54 U.S.L.W. 4329, 63 Daily Labor Report, p. D-1 (BNA, 1986); *Belknap* v. *Hale,* 463 U.S. 491 (1983). The instant case presents a similar state intrusion and concomitant dislocation of the federal labor-management relations structure. Michigan is only one of a growing number of states that have eroded the traditional employment-at-will doctrine by adopting an expansive view of contract principles in the employment context. If unionized employees in these states may utilize such state law contractual rights to preclude an employer's use of an economic weapon permitted by the NLRA, the balance of economic power in labor disputes will be seriously altered. This Court

should determine whether that admitted interference, characterized by the court below as an "appropriate accommodation" of federal and state law (A. 15), was the accommodation intended by Congress.

A. The basic purpose of the NLRA is to preserve interstate labor peace (29 U.S.C. § 151) by "establishing an equitable process for determining terms and conditions of employment." *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U.S. ____, 85 L.Ed.2d 728, 749 (1985). " 'Free collective bargaining is the cornerstone of the structure of labor-management relations carefully designed by Congress when it enacted the NLRA.' " *Golden State Transit Corp., supra*, 63 Daily Labor Report at D-4, quoting *New York Tel. Co.* v. *New York Dept. of Labor*, 440 U.S. 519, 551 (1979) (Powell, J., dissenting). The 1947 Taft-Hartley amendments to the NLRA were adopted to effectuate this Congressional intent.[3] These amendments includ-

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[3] The amendments were necessary, in the words of Senator Taft, the bill's co-sponsor, because "the weight in collective bargaining negotiations is all on the side of labor leaders . . . [and] there was no way in which any court could revise injustices perpetrated by the National Labor Relations Act." 93 Cong. Rec. 3829, 3835 (1947). As stated in the written Report accompanying Senator Taft's bill, "the administration of the National Labor Relations Act itself ha[d] tended to destroy the equality of bargaining power necessary to maintain industrial peace." S. Rep. No. 105, 80th Cong., 1st Sess. 2. The bill was "predicated upon our belief that a fair and equitable labor policy can best be achieved by equalizing existing laws in a manner which will encourage free collective bargaining." *Id.* Senator Taft stated:

> [O]ur aim should be to get back to the point where, when an employer meets with his employees, they have substantially *equal* bargaining power, so that neither side feels that it can make an unreasonable demand and get away with it.
>
> * * *
>
> If there is reasonable *equality* at the bargaining table, I believe that there is much more hope for labor peace.

Footnote continued on following page.

ed enactment of Section 8(d) of the Act to define the phrase "good faith bargaining." Section 8(d) requires the parties to meet and bargain in good faith over all terms and conditions of employment; it specifically provides, however, that the duty to bargain in good faith "does not compel either party to agree to a proposal or require the making of a concession." A. 39. It was thus "recognized from the beginning that agreement might in some cases be impossible . . . leaving the results of the contest to the bargaining strengths of the parties . . . [A]n employer or a union [may] . . . rely ultimately on its economic strength to try to secure what it cannot obtain through bargaining." *H.K. Porter Co.* v. *N.L.R.B.*, 397 U.S. 99, 103, 108, 109 (1970). Unilateral implementation of the employer's final offer is a principal economic weapon of self-help the employer retains once good faith negotiations have exhausted the prospects of reaching agreement. Unions, aware of this significant power, are induced to compromise their demands prior to reaching impasse in the same manner as employers, faced with a possible strike, are encouraged to compromise. This ability to "institute unilaterally [new] working conditions" is thus an important employer "economic weapon" necessary "to counterbalance the employees' power of strike." *American Ship Building Co.* v. *N.L.R.B.*, 380 U.S. 300, 316 (1965).

Footnote continued from preceding page.

* * *

> Basically, I believe that the committee feels, almost unanimously, that the solution of our labor problems must rest on a free economy and on *free* collective bargaining.

93 Cong. Rec. 3829, 3835 (1947) (emphasis added). Senator George, a proponent of the 1935 NLRA, similarly stated that the 1935 Act "was a very one-sided piece of legislation . . . [If] we are to bring about any degree of balance in the unbalanced condition which has existed for almost 12 years, now is the time to do it." 93 Cong. Rec. 7523, 7536 (1947).

Where, as here, an economic weapon available to a party in a labor dispute has been interfered with by state law, "the crucial inquiry" then becomes a determination as to whether exercise of such state authority "'frustrate[s] effective implementation of the Act's processes.'" *Lodge 76, I.A.M.* v. *Wisconsin Employment Relations Commission*, 427 U.S. 132, 147-48 (1976) ("*Machinists*"), quoting *Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 380 (1969). The resolution of this "crucial inquiry" in the instant case warrants review by this Court.

The Michigan courts deemed the admitted interference with collective bargaining resulting from the application of state contract law to be permissible because it was merely "incidental" and was occasioned by a "neutral" state law. Neither rationale comports with the decisions of this Court. The fact that state regulation may only be "incidental" is irrelevant. As this Court recently observed, "[t]he idea that state action may be upheld under such circumstances is part of the *Garmon* analysis," a preemption analysis wholly distinct from the *Machinists* principles applicable herein. *Golden State Transit Corp., supra*, 63 Daily Labor Report at D-3 n. 8. This Court has repeatedly recognized that "a particular activity might be 'protected' by federal law not only when it fell within § 7 [of the NLRA], but also when it was an activity that Congress intended to be 'unrestricted by *any* governmental power to regulate' because it was among the permissible 'economic weapons in reserve . . . .'" *Machinists*, 427 U.S. at 141, quoting *N.L.R.B.* v. *Insurance Agents International Union*, 361 U.S. 477, 488-89 (1960) (emphasis added). "[S]elf-help is, of course, also the prerogative of the employer because he, too, may properly employ economic weapons Congress meant to be *unregulable* . . . [t]he State may not prohibit the use of such weapons or add to an employer's federal legal obligations in collective bargaining any more than in the case of employees. . . ." *Machinists*, 427 U.S. at 147 (emphasis added). See also *Teamsters Union* v. *Morton*, 377 U.S. 252, 258-259 (1964).

The fact that state regulation is "neutral" as opposed to "non-neutral" is similarly irrelevant. As noted by this Court in *Golden State Transit Corp.*, "preemption analysis is not affected by the fact . . . that [a party has] acted through . . . a general law." 63 Daily Labor Report at D-2 n. 5. In drawing such a distinction the Michigan Court of Appeals improperly relied on a concurring opinion of Mr. Justice Powell in *Machinists*. A. 14-15. As Mr. Justice Powell thereafter observed in his dissenting opinion in *New York Telephone Co.*, "pre-emption must turn not on the generality of purpose or applicability of a state law, but on the effect of that law when applied in the context of labor-management relations." 440 U.S. at 558. *New York Telephone* demonstrates that state law interference with collective bargaining is permitted only where "Congress ha[s] decided to tolerate" the intrusion. 440 U.S. at 546. See also *Metropolitan Life Ins. Co.* v. *Massachusetts, supra*, 85 L.Ed.2d at 748, 752 (1985) (state law which neither "alters the balance of power between the parties to the labor contract" nor interferes with "collective bargaining protected by the NLRA" is not preempted). As in *Golden State*, respondents have "pointed to no evidence of such congressional intent with respect to the conduct at issue in this case." 63 Daily Labor Report at D-3.

B. When the respondents invoked federal law by selecting the Union, they delegated to the Union the authority to act as their exclusive bargaining agent. As a result of that selection, they thereby abandoned their right to individually negotiate changes in their employment contracts. The legal framework for such negotiations shifted from traditional common law principles to the NLRA and the federal collective bargaining process. Indeed, because the NLRA "ensures that employees as a group could express their opinions and exert their combined influence over the terms and conditions of employment," (*H.K. Porter, supra*, 397 U.S. at 103), the Auto Club was

expressly prohibited, by virtue of Section 9(a) of the Act (A. 39), from negotiating individually with the respondents or any other members of the bargaining unit. The Auto Club was required instead to negotiate within the collective bargaining framework chosen by the employees. Now, however, some of those employees, the respondents, seek to repudiate that statutorily mandated federal process merely because it worked to their disadvantage.

The final offer implemented by the Auto Club as the end process of collective bargaining involved production standards. If the implementation of those standards can be collaterally attacked under state law, pre-union implied contractual rights could similarly be utilized to vitiate a wide variety of other common unilateral changes that are permissible employer self-help measures: a reduction in wages or benefits after impasse,[4] discontinuing strikers' insurance premiums,[5] contracting out all or a portion of the business,[6] or even hiring permanent strike replacements to maintain production.[7] In all of these situations, under the decision below, while a union could strike or engage in other concerted pressure to obtain its demands, the employer's ability to exercise its corollary self-help weapons would be thwarted by the pre-existing contract rights of the employees in the bargaining unit.

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[4] Such reductions in pay are an increasingly frequent phenomena. In 1985, for example, approximately three percent of negotiated first year wage settlements involved a reduction in pay. *BLS Review of Settlements: 1985*, reprinted in Collective Bargaining Negotiations and Contracts, 18:839 (BNA, 1986).

[5] See *Utility Workers* v. *Boston Edison Co.*, 77 L.R.R.M. 2495 (D. Mass. 1971); *Ace Tank and Heater Co.*, 167 N.L.R.B. 663 (1967); *Knickerbocker Plastic Co., Inc.*, 104 N.L.R.B. 514 (1953), *enf.*, 218 F.2d 917 (9th Cir. 1955).

[6] *Southern California Stationers*, 162 N.L.R.B. 1517, 1537 (1967); *Empire Terminal Warehouse Co.*, 151 N.L.R.B. 1359 (1965), *aff'd.*, 355 F.2d 842 (D.C. Cir. 1966); *N.L.R.B.* v. *Abbott Publishing*, 331 F.2d 209 (7th Cir. 1964).

[7] *N.L.R.B.* v. *Fleetwood Trailer Co.*, 389 U.S. 375, 379 (1967).

Under the view of the Michigan courts, even where an employer's actions conflicted with the pre-union contract rights of a single employee in a bargaining unit of thousands, that employee's contract rights would still prevail. Since there would be no way to ascertain in advance which employees, if any, had implied contract rights that would be impaired by the employer's unilateral action, the employer must, under the view of the Michigan courts, either accept the union's demands or, at its peril, exercise its NLRA self-help rights and face a multitude of employee breach of state contract lawsuits. Juries on a case-by-case basis would have to decide whether there were any such rights and, if so, whether those rights have been impaired.[8] To allow the legality of a bargaining weapon to hinge on a jury's interpretation of the rights running between the employer and each individual in the bargaining unit instills substantial uncertainty in bargaining relationships.

The decision below also disregards Congress' desire to structure a "comprehensive national labor law" (*Amalgamated Assoc. of Street Employees* v. *Lockridge,* 403 U.S. 274, 286 (1971)) to obtain " 'uniform application' of its substantive rules and to avoid the 'diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies.' " *N.L.R.B.* v. *Nash-Finch Co.*, 404 U.S. 138, 144 (1971), quoting *Garner* v. *Teamsters Union,* 346 U.S. 485, 490 (1953). In recent years many states have radically changed

[8] See *Boynton* v. *TRW, Inc.*, 781 F.2d 555, 560-61 (6th Cir. 1986) ("The *Toussaint* court recognized . . . that there was a risk that courts and juries would in effect become the ultimate authority in employment decisions. Any discharged employee can testify after the fact that oral statements or company practices were construed by him as establishing a policy of discharge only for cause; layoffs only according to seniority or ability, as may appear to be advantageous to the employee at the time; or not to take any action with which the employee might find himself dissatisfied. Such possible effects of the *Toussaint* holding were of concern to the dissenting Justice in that case, and frankly to the members of this Court.").

their view of the law of employment contracts. Although Michigan's "sweeping" *Toussaint* decision may represent "[t]he furthest step any court has taken[,]"[9] other states have permitted employees to similarly invoke broad implied contract theories[10] or assert an express contract based on, for example, the policies contained in an employee handbook.[11] Conversely, however, other state courts have rejected these same theories because of the absence of either consideration, definiteness or mutuality.[12] Still other state courts have circumvented these requirements by allowing recovery on a theory of promissory estoppel[13] or a covenant of good faith and fair dealing.[14] There is, in short, a wide divergence as to the availability of state law contract remedies and their corollary impact upon the collective bargaining process. If the decision below is allowed to stand, juries, not the NLRB, will become the final arbiter as to whether, based upon the status of that state's law, an employer

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[9] Lopatka, Kenneth T., "The Emerging Law of Wrongful Discharge—A Quadrennial Assessment of the Labor Law Issue of the 80's," *The Business Lawyer*, Vol. 40, p. 19 (Nov. 1984).

[10] See, *e.g.*, *Pugh* v. *See's Candies, Inc.*, 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981) (implied contract based upon length of employment, oral assurances, past promotions, and personnel policies).

[11] See, *e.g.*, *Mobil Coal Producing, Inc.* v. *Parks*, 704 P.2d 702 (Wyo. 1985); *Southwest Gas Corp.* v. *Ahmad*, 99 Nev. 594, 668 P.2d 261 (1983); *Forrester* v. *Parker*, 93 N.M. 781, 606 P.2d 191 (1980); *Jackson* v. *Minidoka Irrigation Dist.*, 98 Idaho 330, 563 P.2d 54 (1977).

[12] See, *e.g.*, *Pine River State Bank* v. *Mettille*, 333 N.W.2d 622 (Minn. 1983); *Muller* v. *Stromberg Carlson Corp.*, 427 So.2d 266 (Fla. Dist. Ct. App. 1983); *Johnson* v. *National Beef Packing Company*, 220 Kan. 52, 551 P.2d 779 (1976).

[13] See, *e.g.*, *Ravelo* v. *County of Hawaii*, 66 Haw. 194, 658 P.2d 883 (1983).

[14] See, *e.g.*, *Milford* v. *de LaSala*, 666 P.2d 1000 (Alaska 1983); *Gates* v. *Life of Montana Ins. Co.*, 638 P.2d 1063 (Mont. 1982); *Cleary* v. *American Airlines, Inc.*, 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (Ct. App. 1980).

permissibly exercised its NLRA economic self-help measures in response to a good faith bargaining impasse. Review by this Court is necessary, therefore, to resolve a recurrent question of federal preemption which threatens to severely dislocate national labor policy.

C. Review is also warranted to provide needed guidance on the proper interpretation of this Court's decisions in *J.I. Case* v. *N.L.R.B.*, 321 U.S. 332 (1944), and *Belknap* v. *Hale*, 463 U.S. 491 (1983).

In *J.I. Case*, the Court held that an employer could not rely on individual contracts existing prior to unionization to avoid negotiating with a union. The Court's dicta that individual contracts "*may* be held to govern" if negotiations are deadlocked or delayed (321 U.S. at 337 (emphasis added)) was relied upon by the Michigan Court of Appeals as authority for the sweeping proposition that "individual contract rights are not extinguished until the parties enter into a valid collective-bargaining agreement." A. 17. That proposition goes too far. *J.I. Case*, after all, predates both the 1947 Taft-Hartley amendments enacted to equalize the unbalanced state of collective bargaining and the good faith impasse rule subsequently adopted by the NLRB and the courts. *J.I. Case* was also issued prior to the recent proliferation of cases according individual employees broad implied contract rights. Moreover, the *J.I. Case* Court emphasized that "[i]ndividual contracts, no matter what the circumstances that justify their execution or what their terms, may not be availed of to defeat or delay the procedures prescribed by the National Labor Relations Act looking to collective bargaining, nor . . . to forestall bargaining." 321 U.S. at 337. At most, therefore, the Court's dicta indicates that, pending the completion of the negotiating process, up to the point of agreement or a bona fide impasse, individual rights "may be held to govern." This is an entirely different situation than the present case where implied contract rights were held to supersede the *results* of the bargaining process.

The decision below also misinterpreted *Belknap*. The conflict between state and federal law involved in *Belknap*[15] does not, as the Michigan Court of Appeals determined, represent a "similar accommodation" of the parties' rights. A. 15. To the contrary, the striker replacements in *Belknap* were "innocent third parties" (463 U.S. at 500) whose interests were antagonistic to those of the unionized strikers and their bargaining agent. See *Golden State Transit Corp., supra*, 63 Daily Labor Report at D-3 n. 7. Here, by contrast, the respondents' interests throughout the bargaining process were identical to the interests of their union. Having opted to pursue the federal collective bargaining process, the respondents elected to obtain either the fruits of that process or risk a change in their employment conditions if an impasse was reached as the

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[15] Unlike the instant case, allowing the striker replacements in *Belknap* to sue in state court did not create a conflict between state and federal law. As Mr. Justice Blackmun observed, "state law enforcement of promises of permanent employment through damage awards for breach of contract and misrepresentation is consistent with the nature of the federal weapon itself." 463 U.S. at 520 n. 4 (Blackmun concurring). The *Belknap* striker replacements complained that their employer failed to fulfill a commitment to give them permanent jobs regardless of the outcome of the strike. Under federal law, an employer is entitled to permanently replace employees on strike in response to economic conditions (*N.L.R.B.* v. *Fleetwood Trailer Co.*, 389 U.S. 375 (1967)), but employees on strike in response to unfair labor practices may not be permanently replaced. *Mastro Plastics Corp.* v. *N.L.R.B.*, 350 U.S. 270 (1957). Thus, if the strike was economic, the employer was permitted under federal law to make and enforce unconditional commitments to the strike replacements and he could lawfully refuse to displace the replacements to make room for the returning economic strikers. Conversely, if, as in *Belknap*, the strike was in response to employer unfair labor practices, then federal law did not permit the employer to make such promises in the first place. In contrast, state enforcement of the alleged contract rights of the instant respondents would directly and substantially thwart the "federal weapon" of unilateral implementation of the employer's final collective bargaining offer.

result of the rejection of the Auto Club's final offer. Respondents cannot have it both ways: they should not be allowed to select a union representative and, then, once a collective bargaining impasse is reached, disown union representation and seek comfort in pre-union state contract remedies. The respondents, moreover, had a substantial remedy under the NLRA. They would have been entitled to reinstatement with full back pay if the Auto Club committed an unfair labor practice by bargaining in bad faith or by failing to exhaust the bargaining process prior to implementing its final offer. *N.L.R.B.* v. *Katz*, 369 U.S. 736 (1962); 29 U.S.C. §160(c). A. 39. These federal rights, rather than the state remedies permitted by the decision below, represent the accommodation established by Congress.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

KALVIN M. GROVE
STEVEN L. GILLMAN
FOX AND GROVE, CHARTERED
233 South Wacker Drive
Sears Tower—Suite 7818
Chicago, Illinois 60606
312/876-0500

ROBERT FINKEL
FINKEL, WHITEFIELD & SELIK
18860 West Ten-Mile Road
Suite 200
Southfield, Michigan 48075
313/559-8800
Attorneys for Petitioners

APPENDIX

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the City of Lansing, on the 15th day of January in the year of our Lord one thousand nine hundred and eighty-six.

Present the Honorable
G. MENNEN WILLIAMS,
Chief Justice
CHARLES L. LEVIN,
JAMES H. BRICKLEY,
MICHAEL F. CAVANAGH,
PATRICIA J. BOYLE,
DOROTHY COMSTOCK RILEY,
DENNIS W. ARCHER,
Associate Justices

76341

CLIFFORD ROBERTS, STANLEY SNYDER, FRANCIS DOUGLAS STEVENS, DOUGLAS P. CARLAN, DANIEL PICANO, JOHN ROBBINS, and CARL KOLP, on behalf of themselves and on behalf of the class of all Sales Representatives of the defendants in the Counties of Wayne, Macomb, and Oakland,

Plaintiffs-Appellees,

v

AUTOMOBILE CLUB OF MICHIGAN, AUTO CLUB INSURANCE ASSOCIATION, AUTO CLUB CASUALTY INSURANCE COMPANY, AUTO CLUB GROUP INSURANCE COMPANY, and AUTO CLUB LIFE INSURANCE COMPANY,

Defendants-Appellants

SC: 76341
CoA: 66805 (138 MA 488)
LC: 82-203440-CZ

On order of the Court, the delayed application for leave to appeal is considered, and it is DENIED, because we are not persuaded that the questions presented should now be reviewed by this Court.

STATE OF MICHIGAN—ss.

I, CORBIN R. DAVIS, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 15th day of January in the year of our Lord one thousand nine hundred and eighty-six.

CORBIN R. DAVIS, Clerk.

ROBERTS v AUTOMOBILE CLUB OF MICHIGAN

Docket No. 66805. Submitted February 22, 1984, at Detroit. —Decided November 5, 1984.

Plaintiffs, Clifford Roberts, Stanley Snyder and five others, were employed as commission sales representatives by defendants, which are five separate corporations acting under the umbrella of the Automobile Club of Michigan. Plaintiffs had been hired prior to the certification of the Michigan AAA Sales Association as the collective-bargaining representative of all of defendants' commission sales representatives. Defendants and the union attempted to negotiate a collective-bargaining agreement. One of the issues during negotiation was defendants' proposal to adopt minimum production standards, pursuant to which a sales representative who failed to reach the minimum standard would receive warnings, probation, and finally termination. When the parties failed to reach an agreement defendants declared an impasse and then implemented the minimum production standards. Four months later, several of defendants' sales representatives, including plaintiffs, were discharged pursuant to the production standards and were offered lower-paying salaried positions. Plaintiffs brought an action in Wayne Circuit Court seeking injunctive relief and damages, claiming that they each had an oral employment contract in which defendants agreed not to demote or discharge the plaintiffs without just cause, and that defendants had breached these contracts. Defendants moved for accelerated judgment.

REFERENCES FOR POINTS IN HEADNOTES

[1] 73 Am Jur 2d, Summary Judgment § 36.

[2, 5, 6] 48A Am Jur 2d, Labor and Labor Relations §§ 1727, 1729, 1735.

[3] 48 Am Jur 2d, Labor and Labor Relations § 966.

[4] 48 Am Jur 2d, Labor and Labor Relations § 1081.

[6] 48 Am Jur 2d, Labor and Labor Relations §§ 1070, 1071.

claiming that the National Labor Relations Act preempted state court jurisdiction over the matter. The trial court, William Leo Cahalan, J., held that jurisdiction was not preempted and denied the motion. Defendants appealed by leave granted. *Held:*

1. State regulations and causes of action are preempted by the National Labor Relations Act if they concern conduct which is actually or arguably either prohibited or protected by the act or conduct which Congress intended to be unregulated and left to the free play of economic forces.

2. The issues which would be decided by the state court or by the National Labor Relations Board would be different in this case. The state court would decide whether there was an implied employment contract and, if so, whether it was breached. The NLRB would decide whether defendants' unilateral implementation of the production standards was a violation of their duty to bargain and whether a genuine impasse had been reached. The state interests in adjudicating contractual rights outweigh any possible interference with the federal labor laws which might result from permitting the action for breach of contract to proceed.

3. Individual contract rights are not extinguished until the parties enter into a valid collective-bargaining agreement. The plaintiffs' breach of contract action may proceed in the circuit court.

Affirmed.

1. JUDGMENTS—ACCELERATED JUDGMENT.

All well-pled allegations in the complaint are to be accepted as true and construed most favorably to the plaintiff when considering a defendant's motion for accelerated judgment (GCR 1963, 116).

2. LABOR RELATIONS—FEDERAL PREEMPTION.

State regulations or causes of action are preempted by the National Labor Relations Act if they concern conduct which is actually or arguably either prohibited or protected by the National Labor Relations Act or concern conduct which Congress intended to be unregulated and left to the free play of economic forces (29 USC 151 *et seq.*).

3. LABOR RELATIONS—COLLECTIVE BARGAINING.

An employer has a duty to bargain collectively with a representative of its employees, but neither party is obliged to agree to a proposal or to make a concession (29 USC 158[a], [d]).

4. LABOR RELATIONS—COLLECTIVE BARGAINING—IMPASSE—UNILATERAL CHANGES.

An employer may not make a unilateral change in the conditions of employment which are under negotiation; however, following an impasse in negotiations, an employer is generally free to make unilateral changes in wages, hours and other terms and conditions of employment, provided the employer has bargained in good faith and a bona fide impasse has been reached.

5. LABOR RELATIONS—FEDERAL PREEMPTION—STATE LAW.

A state may, without federal preemption by the National Labor Relations Act, regulate conduct which is of only peripheral concern to the act or which is so deeply rooted in local law that the courts should not assume that Congress intended to preempt the application of state law.

6. LABOR RELATIONS—EMPLOYMENT CONTRACTS—COLLECTIVE BARGAINING—ACTIONS.

The contract rights of individual employees under their employment contracts are not extinguished during negotiations for a collective-bargaining agreement pursuant to the National Labor Relations Act until the parties have entered into a valid agreement; until such an agreement is entered into, an employee may pursue an action in a state court for breach of the employment contract.

Greenspon, Scheff & Washington, P.C. (by *George B. Washington*), for plaintiffs.

Fox & Grove (by *Kalvin M. Grove* and *Steven L. Gillman*), and *Levin, Levin, Garvett & Dill* (by *Robert J. Finkel*), for defendants.

Before: D.E. HOLBROOK, JR., P.J., and MACKENZIE and E.A. QUINNELL,* JJ.

E.A. QUINNELL, J. Defendants appeal by leave granted, GCR 1963, 806.3(1)(a)(ii), from a circuit court order denying their motion for accelerated judgment under GCR 1963, 116.1(2). The circuit court rejected defendants' argument that state court subject-matter jurisdiction was preempted by the National Labor Relations Act (NLRA), 29 USC 151 *et seq.* We affirm.

I

Plaintiffs were hired as commission sales representatives prior to February 7, 1978, the certification date of plaintiffs' collective-bargaining representative, the Michigan AAA Sales Association (union). Defendants are five separate corporations acting under the umbrella of the Automobile Club of Michigan. After certification and prior to August 13, 1981, defendants and

* Circuit judge, sitting on the Court of Appeals by assignment.

the union met numerous times in an attempt to negotiate a collective-bargaining agreement. One of the central issues during negotiations was defendants' proposal to adopt minimum production standards. Under this proposal, a sales representative would receive an oral warning, followed in later months by a written warning, probation, and finally termination if the representative failed to reach the minimum standard for four consecutive months.

The parties did not reach an agreement. In July 1981, the defendants made their final offer which included the minimum production standards. The union rejected this proposal. Defendants then declared an impasse and implemented the minimum production standards, effective September 1, 1981. In January 1982, 40 of defendants' 570 commission sales representatives were discharged pursuant to the minimum production standards and offered lower paying salaried positions as advisors. These demotions followed the scheduled progressive discipline steps for violation of the minimum production standards.

Plaintiffs, seven individual sales representatives, filed suit in circuit court seeking a temporary restraining order, permanent injunction, and damages. The substance of plaintiffs' claims was based on *Toussaint v Blue Cross & Blue Shield*, 408 Mich 579; 292 NW2d 880 (1980), *reh den* 409 Mich 1101 (1980). Plaintiffs alleged that they each had an oral employment contract, entered into at the time of their hire prior to union representation, in which defendants agreed not to demote or discharge plaintiffs without just cause. Plaintiffs claimed that defendants breached these contracts, since violations of the minimum production standards did not constitute "cause" under the original employment contracts.[1] Defendants argued

[1] Plaintiffs' complaint also contained counts alleging (1) miscalculation of production levels, (2) age discrimination, and (3) unlawful "redlining". These counts are not involved in this appeal.

that the NLRA preempted state court jurisdiction and moved for accelerated judgment under GCR 1963, 116.1(2). The circuit court denied the motion for accelerated judgment, finding that its subject-matter jurisdiction over plaintiffs' breach of contract claim was not preempted by the NLRA. We agree with the circuit court, and adopt its analysis with only minor variations.

II

In determining whether to grant a motion for accelerated judgment, all well-pled allegations in the complaint are to be accepted as true and construed most favorably to the plaintiff. *George v Petoskey*, 55 Mich App 433, 435; 223 NW2d 6 (1974). Thus, for purposes of determining whether plaintiffs' cause of action has been preempted by the NLRA, we assume that each plaintiff had an oral employment contract with defendants in which defendants agreed not to terminate or demote plaintiffs without just cause.

The United States Supreme Court has developed two doctrines for determining whether state regulations or causes of action are preempted by the NLRA. Under the first, set out in *San Diego Building Trades Council v Garmon*, 359 US 236; 79 S Ct 773; 3 L Ed 2d 775 (1959), state regulations and causes of action are preempted if they concern conduct which is actually or arguably either prohibited or protected by the NLRA. The second preemption doctrine, set out in *Int'l Ass'n of Machinists & Aerospace Workers v Wisconsin Employment Relations Comm*, 427 US 132; 96 S Ct 2548; 49 L Ed 2d 396 (1976), proscribes state regulation and causes of action concerning (*Machinists*) conduct that Congress intended to be unregulated and left to the free play of economic forces.

Defendants assert that plaintiffs' suit for breach of contract, aimed at redressing defendants' unilateral implementation of the minimum production standards, is preempted under both

the *Garmon* and *Machinists* theories of preemption. The issue in this case is one of conflict between defendants' claim that implementing their final offer, which included the minimum performance standards, was an integral part of the collective-bargaining process and plaintiffs' claim that the implementation of the minimum production standards was a breach of plaintiffs' pre-existing employment contracts under state law.

Under § 8(a)(5) of the NLRA, an employer has the duty to bargain collectively with a representative of its employees. 29 USC 158(a)(5). Section 8(d), which defines this duty to include the obligation to meet at reasonable times and places to bargain over wages, hours, and other conditions of employment, does not compel either party to agree to a proposal or make a concession. 29 USC 158(d). An employer's unilateral change in the conditions of employment under negotiation is a violation of § 8(a)(5). However, following an impasse in negotiations, an employer is, generally, free to make unilateral changes in wages, hours and other terms and conditions of employment. *Bi-Rite Foods, Inc.* 147 NLRB 59 (1964). Nevertheless, the employer does not have the right to unilaterally change employment conditions unless it bargained in good faith and reached a bona fide impasse in negotiations. The employer must fulfill these prerequisites, prior to implementing the final offer, or its conduct will constitute an unfair labor practice under the NLRA. On the issue of impasse, see, generally, Gorman, Labor Law—Basic Text, pp 439-454.

III

We first address defendants' argument that plaintiff's breach of contract cause of action is preempted under the *Garmon* theory of preemption which precludes state actions concerning matters at least arguably prohibited by the NLRA. Defendants assert that their unilateral implementation of the minimum production standards was "arguably prohibited" by

§ 8(a)(5) of the NLRA, since the company did not have the right to unilaterally change employment conditions unless a bona fide impasse was reached. Thus, defendants argue that the implementation of the minimum production standards is "arguably prohibited" by the NLRA and plaintiffs' sole source of relief is the National Labor Relations Board (NLRB).

The Supreme Court has indicated that the *Garmon* guidelines are not to be applied in a literal, mechanical fashion, and it has developed a number of exceptions to *Garmon* preemption which are particularly applicable where states seek to regulate conduct which is arguably *prohibited* rather than arguably *protected*. *Sears, Roebuck & Co v. San Diego County Dist Council of Carpenters*, 436 US 180, 194-197; 98 S Ct 1745; 56 L Ed 2d 209 (1978). A state may regulate conduct that is of only peripheral concern to the NLRA or which is so deeply rooted in local law that the courts should not assume that Congress intended to preempt the application of state law. *Garmon, supra*, 359 US 243-244.

In *Linn v United Plant Guard Workers of America*, 383 US 53; 86 S Ct 657; 15 L Ed 2d 582 (1966), the Court held that an employer official, who was allegedly libeled during a union organizing campaign, could maintain an action for defamation despite the fact that the union conduct was arguably an unfair labor practice under § 8(b)(1)(A) of the NLRA. Similarly, in *Farmer v United Brotherhood of Carpenters & Joiners of America*, 430 US 290; 97 S Ct 1056; 51 L Ed 2d 338 (1977), the Court held that the NLRA did not preempt a state action for intentional infliction of emotional distress, despite the arguably prohibited nature of the conduct. The Court identified two factors which warranted a departure from the general preemption guidelines. First, there existed a significant state interest in protecting its citizens from the challenged conduct. Second, the exercise of state jurisdiction over the tort claim entailed little risk of interference with the regulatory jurisdiction

of the NLRB, since the controversies presented to the state and federal forums would be different. *Farmer, supra*, p 304-305.

In *Sears, Roebuck & Co v Carpenters, supra*, the Court held that a state trespass action to enjoin peaceful picketing was not preempted. In that case, union pickets were stationed on Sears's property. When the union refused to remove the pickets, Sears obtained an injunction against the trespass and the pickets moved to a nearby public sidewalk. Finding, among other things, that the picketing was arguably prohibited under § 8, the Court, following the reasoning of *Farmer*, indicated that the critical inquiry was "whether the controversy presented to the state court is identical to * * * or different from * * * that which could have been, but was not, presented to the Labor Board". *Sears, supra*, p 197. The Court concluded that there was little risk of interference with the NLRB's regulatory jurisdiction, since the state court action concerned only the *location* of the picketing while the arguably unfair labor practice would focus on the *object* of the picketing. *Sears, supra*, p 198.

Recently, in *Belknap, Inc v Hale*, __ US __; 103 S Ct 3172; 77 L Ed 2d 798 (1983), the Court held that employees hired to replace striking workers could maintain causes of action in state court for misrepresentation and breach of contract. Although the replacement employees were hired as permanent employees, after the strike was settled the replacement employees were laid off to make room for the returning strikers. The replacement employees sued in state court for misrepresentation and breach of contract. The Court found that, even though the contracts for permanent employment in this instance were arguably prohibited by the NLRA, the state action was permissible since the foci of the determinations by the NLRB and the state court differed and the state had a substantial interest in protecting its citizens from misrepresentation and in providing remedies for breach of contract. The Court concluded that,

since the NLRB could provide no relief to the discharged replacement employees, the state's interests clearly outweighed any possible interference with the NLRB's function that might result from permitting the state action. *Belknap, supra*, 103 S Ct 3183; 77 L Ed 2d 814-815.

Application of these principles to the facts of the instant case leads to the conclusion that state court jurisdiction is not preempted under *Garmon, supra*. Plaintiffs' cause of action is based on *Toussaint, supra*. *Toussaint* holds, generally, that statements by an employer in its personnel policy literature and procedural manual may imply a contractual promise not to discharge the employee without good cause. The controversy presented to the state court will be different from that which would be presented to the NLRB. In the instant case, the state court is to decide whether or not there was an implied employment contract, and, if so, whether it was breached. In contrast, the NLRB would have to decide whether defendants' unilateral implementation of the production standards was a violation of their duty to bargain. The NLRB would focus on whether defendants bargained in good faith to a bona fide impasse. The NLRB would not decide whether defendants' action constituted a breach of plaintiffs' employment contracts. See, *e.g., JI Case Co. v National Labor Relations Bd*, 321 US 332, 340; 64 S Ct 576; 88 L Ed 762 (1944). Since this state has a substantial interest in adjudicating contractual disputes arising within its jurisdiction, we believe, as did the United States Supreme Court in *Belknap, supra*, that state interests outweigh any possible interference with the federal labor laws that might result from permitting the action for breach of contract to proceed.

IV

We next address defendants' argument that plaintiffs' suit for breach of contract is preempted under *Machinists v Wiscon-*

sin Employment Relations Comm, supra, which proscribes state actions in areas Congress intended to be unregulated. Defendants contend that the right to implement a final offer following good faith bargaining is an integral component of the collective-bargaining process which Congress intended to leave unregulated and subject to the free play of economic forces. Defendants point out that, since § 8(d) of the NLRA does not require any party to make a concession during negotiations, Congress obviously contemplated that stalemates would occur short of reaching an agreement. Once the parties have reached such a stalemate, unilateral changes are sanctioned, not only because it may break the impasse and thereby induce productive bargaining, but also because the failure of the parties to reach an agreement, after good faith negotiations, should not permanently restrain an employer from effectuating business changes. Thus, defendants argue, the NLRB and courts have recognized that an employer may make a unilateral change as a self-help economic weapon to counterbalance the employees' power to strike, which may break the deadlock of impasse, and also to relieve the employer of the requirement that it maintain the status quo once the union has refused to reach agreement.

In *Machinists*, union members refused to work overtime during negotiations for renewal of an expired collective-bargaining agreement. The NLRB dismissed a complaint of the employer, finding that there was no violation of the NLRA. Thereafter, the employer obtained an order from the Wisconsin Labor Relations Commission enjoining the union members from refusing overtime assignments, based on a finding that the union had committed an unfair labor practice under state law. The Supreme Court found that the NLRA preempted state or federal causes of action where it was determined that Congress intended the conduct to be unregulated and left to the free play of economic forces. The Supreme Court stated: "Whether self-help economic activities are employed by employer or union, the crucial inquiry regarding preemption is the same: whether

'the exercise of plenary state authority to curtail or entirely prohibit self-help would frustrate effective implementation of the Act's processes.'" 427 US 132, 147-148 (quoting from *Brotherhood of Railroad Trainmen* v *Jacksonville Terminal Co.* 394 US 369, 380; 89 S Ct 1109; 22 L Ed 2d 344 [1969]). The Court concluded that the NLRA's processes would be frustrated by the Wisconsin law, since the use of economic pressure by the parties to a labor dispute is part and parcel of the collective-bargaining process and Wisconsin had attempted to regulate the substantive aspects of the bargaining process. 427 US 132, 148-149.

Defendants herein argue that, as in *Machinists*, plaintiffs may not maintain a breach of contract action which would frustrate the employer's right to implement its final offer after negotiations have reached impasse. We believe that the circuit court correctly read *Machinists* in light of Justice Powell's concurrence:

> "I write to make clear my understanding that the Court's opinion does not, however, preclude the States from enforcing, in the context of a labor dispute, 'neutral' state statutes or rules of decision: state laws that are not directed toward altering the bargaining positions of employers or unions but which may have an incidental effect on relative bargaining strength. Except where Congress has specifically provided otherwise, the States generally should remain free to enforce, for example, their law of torts or of contracts, and other laws reflecting neutral public policy.* See Cox, Labor Law Preemption Revisited, 85 Harv L Rev 1337, 1355-1356 (1972).

"* State laws should not be regarded as neutral if they reflect an accommodation of the special interests of employers, unions, or the public in areas such as employee self-organization, labor disputes, or collective bargaining." 427 US 132, 156.

In the instant case, the circuit court concluded that state enforcement of an employment contract does not directly regulate the concerns of the NLRA. Although enforcement of an employment contract may have an incidental effect on the collective-bargaining process, the employer's right to implement its final offer emanates from its common-law, entrepreneurial right to run its business. However, the employer's common-law right to implement its final offer must be seen as limited by the employer's common-law duty to honor its contracts of employment. We believe that this is the appropriate accommodation of the parties' rights. A similar accommodation was found in *Belknap, supra.*

Defendants also argue, under the *Machinists* doctrine, that pre-existing employment contract rights cannot be used to supersede the results of collective bargaining. Defendants concede that rights under individual employment contracts survive election of a union and the beginning of negotiations, but contend that those claims disappear when impasse is reached. To hold otherwise, defendants argue, would obviate the process of collective bargaining. We disagree.

In *National Licorice Co. v National Labor Relations Bd,* 309 US 350; 60 S Ct 569; 84 L Ed 799 (1940), the Court considered a prior employment agreement which purportedly foreclosed employees from striking, from demanding a closed shop, and from signing agreements with any union. In sustaining the order of the NLRB forbidding the employer from enforcing the prior agreements, the Court stated:

> "The effect of the Board's order, as we construe it, is to preclude the [employer] from taking any benefit of the contracts which were procured through violation of the Act and which are themselves continuing means of violating it, and from carrying out any of the contract provisions, the effect of which would be to infringe the rights guaranteed by the National Labor Relations Act. *It does not foreclose the employees from taking any action to secure an adjudica-*

> *tion upon the contracts, nor prejudge their rights in the event of such adjudication.* We do not now consider their nature and extent. It is sufficient to say here that it will not be open to any tribunal to compel the employer to perform the acts, which, even though he has bound himself by contract to do them, would violate the Board's order or be inconsistent with any part of it." 309 US 350, 365 (emphasis added).

The Court's construction of the order illustrated its concern for preserving the contract rights of the employees. The Court also read the order to be directed solely to the employer and as "ineffective to determine any private rights of the employees and leaves them free to assert such legal rights as they may have acquired under their contracts, in any appropriate tribunal * * *". *National Licorice*, 309 US 350, 366.

Similarly, in *JI Case Co* v *NLRB*, *supra*, the United States Supreme Court upheld an NLRB finding that the employer could not use pre-existing individual employment contracts as a device to avoid collective bargaining with its employees. Contrary to the suggestion of defendants herein, the Court did not hold that the terms of an individual employment contract were totally extinguished. The Court stated:

> "Care has been taken in the opinions of the Court to reserve a field for the individual contract, even in industries covered by the National Labor Relations Act, not merely as an act or evidence of hiring, but also in the sense of a completely individually bargained contract setting out terms of employment, because there are circumstances in which it may legally be used, in fact, in which there is no alternative. Without limiting the possibilities, instances such as the following will occur: Men may continue work after a collective agreement expires and, despite negotiation in good faith, *the negotiation may be deadlocked or delayed; in the interim express or implied individual agreements may be held to govern.*" 321 US 336-337 (emphasis added).

The specific language of *JI Case* indicates that individual contract rights are not extinguished until the parties enter into a valid collective-bargaining agreement. Plaintiffs' actions for breach of contract are enforceable in state court.

V

We hold that plaintiffs are not prohibited from maintaining breach of contract actions under either the *Garmon* or the *Machinists* doctrine of federal preemption. Therefore, the judgment of the circuit court is affirmed and this cause is remanded for proceedings not inconsistent with this opinion.

Affirmed. No costs, a public question being involved.

STATE OF MICHIGAN
CIRCUIT COURT OF COUNTY OF WAYNE

CLIFFORD ROBERTS, et al.,
Plaintiffs,

v.

AUTOMOBILE CLUB OF MICHIGAN, et al.,
Defendants.

82-203440 CZ

ORDER DENYING IN PART DEFENDANTS' MOTION FOR ACCELERATED OR SUMMARY JUDGMENT AND DENYING MOTION FOR A STAY OF DISCOVERY

At a session of said Court, held in the City-County Building, in the City of Detroit, on the 25th of June, 1982.

PRESENT: HONORABLE WILLIAM LEO CAHALAN, Circuit Judge

This matter having come on for hearing on defendant's Motion for Accelerated Judgment, or in the Alternative for Summary Judgment, and the parties having filed extensive briefs and argued orally regarding said motion, and the Court being fully advised in the premises;

NOW, THEREFORE, for the reasons set forth in the Court's May 28 Opinion on Issue of Preemption the Motion for Accelerated, or in the Alternative Summary Judgment, is denied insofar as it alleges that this action has been pre-empted by the operation of the National Labor Relations Act, 29 U.S.C. § 151 *et seq.* The remainder of the motion remains extant. It is further ordered that pursuant to General Court Rule 806.3 the issues discussed in the Court's May 28 Opinion are certified as involving controlling questions of law as to

which there is substantial ground for difference of opinion and that an immediate appeal from this order may materially advance the ultimate termination of the litigation.

It is further ordered that the motion for a stay of discovery be and hereby is denied.

WILLIAM LEO CAHALAN
William Leo Cahalan—Judge
Third Judicial Circuit

Approved as to Form:

KALVIN M. GROVE
STEVEN L. GILLMAN
FOX AND GROVE, CHARTERED
233 South Wacker Drive
Suite 7818
Chicago, Illinois 60606
312/876-0500
Attorneys for Defendants

GEORGE B. WASHINGTON
(P-26201)
GREENSPON, SCHEFF & WASHINGTON
2137 Commonwealth Building
Detroit, Michigan 48226
313/963-1221
Attorneys for Plaintiffs

A TRUE COPY
JAMES R. KILLEEN
CLERK

By A. JUSTICE
Issuing Clerk

STATE OF MICHIGAN

IN THE CIRCUIT COURT

FOR THE COUNTY OF WAYNE

Clifford Roberts, et al., *Plaintiffs,* v. Automobile Club of Michigan, et al., *Defendants.*	Civil Action No. 82-203-440-CZ

OPINION
ON
ISSUE OF PREEMPTION

STATE OF MICHIGAN

IN THE CIRCUIT COURT

For the County of Wayne

Clifford Roberts, et al.,
Plaintiffs,

v.

Automobile Club of Michigan, et al.,
Defendants.

Civil Action
No. 82-203-440-CZ

OPINION ON ISSUE OF PREEMPTION

This suit arises from the discharge or demotion of a group of sales representatives, plaintiffs herein, by their employers, Automobile Club of Michigan and others, defendants herein. The case is presently before the Court on defendants' Motion for Accelerated Judgment, pursuant to GCR 1963, 116.1(2), on Counts I and II of the complaint. Defendants assert that the Court lacks subject matter jurisdiction to decide this controversy because its jurisdiction has been pre-empted by the operation of the National Labor Relations Act, 29 USC § 151 *et seq.* (NLRA), and that the case ought to be before the National Labor Relations Board (NLRB).

Plaintiffs allege, and the Court will assume for the sake of this Motion, that each plaintiff had an oral employment contract with defendants in which defendants agreed not to terminate or demote plaintiffs without cause.[1] Plaintiffs claim

[1] It is acknowledged that plaintiffs base their cause of action alleged in Counts I and II on the holding of *Toussaint* v *Blue Cross and Blue Shield of Michigan*, 408 Mich 579, 598 (1980):

(Footnote continued on following page.)

that subsequent unilateral revisions in defendants' sales quotas and standards, (so called "Minimum Performance Standards") the alleged violation of which purportedly caused the discharge or demotion of plaintiffs, do not constitute "cause" under their original employment contracts, and hence, by discharging or demoting plaintiffs on account of violations of these unilateral changes in sales quotas and standards, defendants have breached the contracts. The relief sought is for damages and for reinstatement.

In their Motion, defendants call attention to other facts which, they claim, operate to oust this Court of its jurisdiction. It is undisputed that when the alleged oral employment contracts were originally entered into the sales representatives were not members of any union. However, since October of 1980, the plaintiff sales representatives have organized themselves, and have elected a collective bargaining agent, the Michigan AAA Sales Association (the union), to represent the sales representatives. Since that time, the Union and defendants have attempted to conclude a collective bargaining agreement without success. Defendants claim that a good faith impasse in the collective bargaining process was reached, and that only at this point did they implement the Minimum Performance Standards as part of their last offer to the Union.

Defendants conclude from these facts that the Court's jurisdiction has been pre-empted, and that the instant con-

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(Footnote continued from preceding page.)

1) A provision of an employment contract providing that an employee shall not be discharged except for cause is legally enforceable although the contract is not for a definite term—the term is "indefinite," and

2) such a provision may become part of the contract either by express agreement, oral or written, or as a result of an employee's legitimate expectations grounded in an employer's policy statements.

troversy properly belongs before the NLRB. Their conclusion rests on three theories: *First*, once a collective bargaining agent was elected and the collective bargaining process begun, the enforcement of pre-existing contract rights cannot be used to interfere with or impede the collective bargaining process since once a collective bargaining agent is elected and collective bargaining begun, individual contract rights are deemed to be extinguished. *Second*, the conduct complained of, namely the defendants' implementation of the Minimum Performance Standards, is activity which is arguably protected under Section 7 of the NLRA, 29 USC § 157, or prohibited under § 8, of the NLRA, 29 USC § 158. Controversies involving such activities are to be resolved exclusively by the NLRB. *Third*, the right of free collective bargaining, including the right to resort to economic sanctions, may not be infringed by state courts because Congress has intended that such conduct be left unregulated.

I

The first issue to be discussed is whether the election of a collective bargaining agent and the initiation of collective bargaining so far extinguishes all previously existing employment contracts such that a suit for a purported breach of the previous contract may not be entertained in state court since to do so would constitute an undue interference with the collective bargaining process.

In *J. I. Case Co* v *NLRB*, 321 US 332, 88 L Ed 762 (1943), the Court had an opportunity to examine the effect of collective bargaining and collective bargain agreements on pre-existing employment contracts. In that case, an employer had previously entered into separate employment contracts with individual employees before collective bargaining occurred. The employer refused to bargain with the union alleging that to

do so would constitute a breach of its prior employment contracts. A complaint was brought before the NLRB, and it issued an order which ordered the employer to cease from giving effect to the pre-existing contracts. The Supreme Court affirmed and held that the employer could not use the individual employment contracts as a device which would excuse him from collectively bargaining with his employees. The Court noted:

> Individual contracts, no matter what the circumstances that justify their execution or what their terms, may not be availed of to defeat or delay the procedures prescribed by the National Labor Relations Act looking to collective bargaining, nor to exclude the contracting employee from a duly ascertained bargaining unit; nor may they be used to forestall bargaining or to limit or condition the terms of the collective agreement.

Id. at 337, 88 L Ed at 767.

However, contrary to the suggestion of defendants, the Court did not hold that the terms of an individual employment contract were totally extinguished. As the Court noted:

> Care has been taken in the opinions of the Court to reserve a field for the individual contract, even in industries covered by the National Labor Relations Act, *not merely as an act or evidence of hiring, but also in the sense of a completely individually bargained contract setting out terms of employment,* because there are circumstances in which it may legally be used, in fact, in which there is no alternative. Without limiting the possibilities, instances such as the following will occur: Men may continue work after a collective agreement expires and, despite negotiation in good faith, *the negotiation may be deadlocked or delayed; in the interim express or implied individual agreements may be held to govern.*

Id. at 336-337, 88 L Ed at 767 (emphasis added).

This reasoning is in accord with the holding of an earlier case, *National Licorice Co* v *NLRB*, 309 US 350, 84 L Ed 799 (1939), in which the Court considered a prior agreement

between an employer and its employees, which purportedly foreclosed its employees from striking, from demanding a closed shop or from signing agreements with any unions. In sustaining the Order of NLRB, which forbade the employer from enforcing the prior agreement, the Court said

> The effect of the Board's order, as we construe it, is to preclude the petitioner from taking any benefit of the contracts which were procured through violation of the Act and which are themselves continuing means of violating it, and from carrying out any of the contract provisions, the effect of which would be to infringe the rights guaranteed by the National Labor Relations Act. *It does not foreclose the employees from taking any action to secure an adjudication upon the contracts, nor prejudge their rights in the event of such adjudication.* We do not now consider their nature and extent. It is sufficient to say here that it will not be open to any tribunal to compel the employer to perform the acts, which, even though he has bound himself by contract to do them, would violate the Board's order or be inconsistent with any part of it.

Id. at 365, 84 L Ed at 811 (emphasis added).

The Court's concern over preserving the right of the employees to enforce the beneficial portions of the contract was further emphasized in its modification of the NLRB's order.

> As the National Labor Relations Act contemplates no more than the protection of the public rights which it creates and defines, and as the Board's order is directed solely to the employer and is *ineffective to determine any private rights of the employees and leaves them free to assert such legal rights as they may have acquired under their contracts, in any appropriate tribunal. . .*
>
> The Board's order to post notices requires the notice to announce that the contracts with the employees are "void and of no effect". In order that the notice may more accurately represent the affirmative action of the Board and that misinterpretation of its action may be avoided, the

order appealed from should be so modified as to omit the quoted words and direct that clause (3) of the Board's order, numbered 2(d) specifying the contents of the notice, read as follows:

> (3) that the individual contracts of employment entered into between the respondent and some of its employees were made by the respondent in violation of the National Labor Relations Act; and that the respondent will no longer offer, solicit, enter into, continue, enforce, or attempt to enforce such contracts with its employees; *but this is without prejudice to the assertion by the employees of any legal rights they may have acquired under such contracts.*

Id. at 366-367, 84 L Ed at 812.

Therefore, it cannot be said that the individual contract rights are extinguished once the collective bargaining process has begun so as to preclude their enforcement in an "appropriate tribunal",[2] state or federal.

II

The next question is whether the enforcement of the individual contracts in a state court would so far conflict with the NLRB's exclusive jurisdiction to regulate activities which are protected by Section 7 of the NLRA, 29 USC § 157, or are prohibited under Section 8, 29 USC § 158 that due regard for the federal enactment requires that state jurisdiction in this controversy must yield.

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[2] It should be noted that the NLRB could not be an appropriate tribunal in which to adjudicate the validity of the contracts. As noted in *J.I. Case Co* v *NLRB*, *supra* at 340, 88 L Ed at 769: "The Board, of course, has no power to adjudicate the validity or effect of such contracts except as to their effect on matters within its jurisdiction." *See also National Licorice Co* v *NLRB*, *supra* at 364, 88 L Ed at 810; *Local Union No 67* v *Duquesne Brewing Co of Pittsburgh*, 354 F Supp 1033, 1034 (WD Pa, 1973).

The general test to determine the permissible scope of state regulation of activity touching upon labor-management relations is stated in *San Diego-Building Trades Council* v *Garmon*, 359 US 236, 245, 3 L Ed 2d 775, 783 (1959):

> When an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of State interference with national policy is to be averted.

However, in commenting on the reach of this broad rule, the Court noted in *Sears Roebuck & Co* v *Carpenters*, 436 US 180, 188-189, 56 L Ed 2d 209, 219-220 (1978):

> While the *Garmon* formulation accurately reflects the basic federal concern with potential state interference with national labor policy, the history of the labor pre-emption doctrine in this Court does not support an approach which sweeps away state-court jurisdiction over conduct traditionally subject to state regulation without careful consideration of the relative impact of such a jurisdictional bar on the various interests affected . . .
>
> Thus the Court has refused to apply the *Garmon* guidelines in a literal, mechanical fashion. This refusal demonstrates that . . . 'the decision to pre-empt . . . state court jurisdiction over a given class of cases must depend upon the nature of the particular interests being asserted and the effect upon the administration of national labor policies' of permitting the state court to proceed.

In the instant case, defendants assert that the plaintiffs' suit for breach of contract is aimed essentially at regulating its unilateral implementation of the Minimum Performance Standards. They claim that such activity is either arguably protected or arguably prohibited by the NLRA.

Section 7 of the NLRA deals exclusively with employees' rights incident to forming a collective bargaining unit. Therefore defendants activities cannot be said to be "protected

activities" under § 7. Section 8 of the NLRA, however, addresses those activities which are prohibited. Under Section 8(a) (1) and (5) of the NLRA, 29 USC 158(a) (1), (5), an employer may not unilaterally implement changes in the terms and conditions of employment. An exception is found when, during the collective bargaining process, an impasse has been reached after good faith negotiations have been attempted. Upon such an impasse having been reached, the employer may implement its last offer. *NLRB* v *Bradley-Wash Fountain Co,* 192 F2d 144, 150-151 (7th Cir 1951); *Excavation-Construction, Inc* v *NLRB,* 660 F2d 1015, 1023 (4th Cir 1981). The unilateral implementation of the Minimum Production Standards, thus, could be considered activity which is at least arguably, prohibited by Section 8. Under a formulistic application of *Garmon, supra,* the present suit could be deemed to be pre-empted. However, as made clear by *Farmers* v *Carpenter,* 430 US 290, 302, 51 L Ed 2 338, 351 (1977) and *Sears, Roebuck & Co* v *Carpenters, supra,* an "inflexible application of the doctrine is to be avoided". Rather the Court's resolution of the question of pre-emption in such cases rests on a "balanced inquiry" into such factors as the nature of the federal and state interests in regulation and the potential for interference with federal regulation. *Farmers* v *Carpenter, supra* at 300, 51 L Ed at 350. The Court, in *Farmers,* used this approach when analyzing a prior case, *Linn* v *Plant Guard Workers,* 383 US 53, 15 L Ed 2d 582 (1966) (holding that an employee's common law cause of action for malicious libel was not pre-empted):

> But a number of factors influenced the (*Linn*) Court to depart from the *Garmon* rule. First, the Court noted that the underlying conduct—the intentional circulation of defamatory material known to be false—was not protected under the Act, 383 US, at 61, 15 L Ed 2d 582, 86 S Ct 657, and there was thus no risk that permitting the state cause of action to proceed would result in state regulation of conduct that Congress intended to protect. Second, the

> Court recognized that there was 'an overriding state interest' in protecting residents from malicious libels, and that this state interest was 'deeply rooted in local feeling and responsibility'.
>
> *Id.*, at 61, 62, 15 L Ed 2d 582, 86 S Ct 657.
>
> Third, the Court reasoned that there was little risk that the state cause of action would interfere with the effective administration of national labor policy. The Board's § 8 unfair labor practice proceeding would focus on whether the statements were misleading or coercive; whether the statements also were defamatory would be of no relevance to the Board's performance of its functions.
>
> *Id.*, at 63, 15 L Ed 2d 582, 86 S Ct 657.
>
> Moreover, the Board would lack authority to provide the defamed individual with damages or other relief. *Ibid.* Conversely, the state law action would be unconcerned with whether the statements were coercive or misleading in the labor context, and in any event the court would have power to award *Linn* relief only if the statements were defamatory. Taken together, these factors justified an exception to the pre-emption rule.
>
> *Id.* at 298, 299, 51 L Ed 2d at 349.

The *Farmer* Court's analysis of the facts before it, involving a common law suit for intentional infliction of emotional distress, paralleled the above analysis. It noted that the federal statutes did not protect or prohibit the "outrageous conduct" complained of by the plaintiff. *Id.* at 302, 51 L Ed at 351. Looking at the state interests involved, the Court noted that the State had a substantial interest in protecting its citizens from the kind of abuses of which the plaintiff had complained. *Id.* Although the Court acknowledged that there would be some risk that the state cause of action would touch on an area of primary federal concern it held that the risk was insubstantial. It reasoned that the abusive conduct and the severe emotional distress allegedly caused thereby with which the state tort action was concerned, would be largely irrelevant to the proceedings on an unfair labor practice claim before the NLRB, which would focus on

whether the union discriminated or threatened to discriminate against him in employment referrals. *Id.* at 304, 51 L Ed 2d 352-353. Accordingly, the Court held that plaintiff's cause of action was not pre-empted.

In *Sears Roebuck & Co* v. *Carpenters, supra*, a case involving whether the enforcement of a state trespass statute as to the location of picketing was pre-empted, the Court used a similar analysis in holding that there was no pre-emption. The Court discussed the problem as follows:

> The critical inquiry, therefore, is not whether the State is enforcing a law relating specifically to labor relations or one of general application but whether the controversy presented to the state court is identical to (as in *Garner*) or different from (as in *Farmer*) that which could have been, but was not, presented to the Labor Board. For it is only in the former situation that a state court's exercise of jurisdiction necessarily involves a risk of interference with the unfair labor practice jurisdiction of the Board which the arguably prohibited branch of the *Garmon* doctrine was designed to avoid.
>
> [1c] In the present case, the controversy which Sears might have presented to the Labor Board is not the same as the controversy presented to the state court. If Sears had filed a charge, the federal issue would have been whether the picketing had a recognitional or work reassignment objective; decision of that issue would have entailed relatively complex factual and legal determinations completely unrelated to the simple question whether a trespass had occurred. Conversely, in the state action, Sears only challenged the location of the picketing; whether the picketing had an objective proscribed by federal law was irrelevant to the state claim. Accordingly, permitting the state court to adjudicate Sears' trespass claim would create no realistic risk of interference with the Labor Board's primary jurisdiction to enforce the statutory prohibition against unfair labor practices. (footnotes omitted)

Id. at 197-198, 56 L Ed 2d at 225-226.

In reviewing the analysis of the above cases, it seems that where the competing State and Federal interests are substantially different, and where the issues involved, if the case were presented before a state court or the NLRB, would be different and turn on the evaluation of substantially different facts, despite the rule of *Garmon, supra*, pre-emption would not be found. Application of these principles in conjunction with the analysis of the above described cases, results in a conclusion that pre-emption based upon Sections 7 and 8 of the NLRA, 29 USC § 157, 158, does not obtain in the instant case.

First, it is to be noted that defendants' acts are not "protected" as understood in the context of the NLRA. As noted in *Sears Roebuck & Co* v *Carpenter, supra*, at 190, 56 L Ed at 221, acts which are protected are those acts protected under § 7 of the NLRA, 29 USC 157.[3] As noted earlier, the provisions of § 7 apply to the activities by employees in organizing a collective bargaining unit and in seeking collective bargaining rights. Therefore, defendants actions cannot be said to be those which are protected by the Act. Indeed, the employers' "right" to implement a last offer arises in the context of labor management disputes only when it is alleged that it might constitute an unfair labor practice on the part of the employer as violative of the employers' duty to bargain collectively in good faith pursuant to § 8(a)(5), *NLRB* v *Bradley Wash Fountain Co, supra*, or the employer's duty not to

[3] It should be noted that the Court considered protected acts also to be those acts which under the line of cases exemplified by *Machinists* v *Wisconsin Employment Relations Commission*, 427 US 132, 49 L Ed 2d 396 (1976) pre-emption was found to exist regarding activities neither protected by § 7 nor prohibited by § 8 but where it was found that Congress intended that the conduct involved be unregulated and left to be controlled by the free play of economic forces. Because the application of *Machinists* in the instant case involves analysis significantly different from that utilized in *Farmer* and *Sears Roebuck & Co*, this Court will consider *Machinists* separately in a latter portion of this opinion.

interfere with the Union's relationship with its members by undercutting its representation of its members pursuant to § 8(a)(1). *Excavation Construction Inc* v *NLRB; NLRB* v *Bradley Wash Fountain Co, supra.* Hence, the Court concludes that the activity which is complained of is not prohibited under § 8 of the NLRA.

Although the state's interest is not as evident in the instant case as it would be in the instance of the State's prohibition of violence or other tortious acts, state courts have long enjoyed traditional jurisdiction over contractual disputes arising within their jurisdiction. *Dowd Box Co* v *Courtney*, 368 US 502, 505, 7 L Ed 483, 486 (1962), *quoting from* 341 Mass 337, 339, 169 NE 2d 885, 887. And, as noted earlier the NLRB has no power to adjudicate the validity or effect of individual employment contracts. *J. I. Case* v *NLRB, supra; National Licorice Co* v *NLRB, supra.* The presence of traditional jurisdiction in the state court to resolve disputes arising out of private employment contracts, and the absence of it in the NLRB, suggests that there is a cognizable state interest.

Finally, a comparison of the issues involved were an unfair labor suit brought before the NLRB attacking the implementation of the minimum performance standards with those involved in plaintiffs suit for breach of contract in this court leads to the conclusion that there is little risk that the state cause of action will interfere with the effective administration of the national labor policy. An unfair labor suit before the NLRB alleging a violation of Section 8(a)(5) would necessarily focus on whether there was a bonafide impasse in the collective bargaining negotiations. Facts relevant to this determination would seem to center on the activities of the parties during collective bargaining and the parties' efforts at attempting resolution of collective bargaining issues. *Taft Broadcasting*, 163 NLRB 475, 478 (1962). Or, an unfair labor practice suit alleging a violation of Section 8(a)(1) would necessarily focus

on whether a bonafide impasse in negotiations had occurred and also whether the employer's actions were meant to interfere with, coerce, or restrain employees in the exercise of their collective bargaining rights, and whether the acts were meant to disparage or undermine the Union's representation of its members. *NLRB* v *Bradley Wash Fountain Co, supra* at 151. On the other hand, plaintiffs state cause of action for breach of contract would primarily focus on the terms and conditions of employment as originally agreed upon, either expressly or impliedly between the parties. Specifically, it would revolve on whether the original agreement embodied any promise by the employer not to discharge the sales representatives without cause. *Toussaint* v *Blue Cross and Blue Shield of Michigan, supra* at 598, and if so to what extent did it leave the employer free to alter the standards of performance by which cause sufficient for dismissal or demotion could be determined such that a subsequent unilateral change by the employer in the performance standards and the enforcement thereof which resulted in the dismissal or demotion of employees would constitute a breach of contract. What the original agreement between the parties was or what they intended by the original agreement are matters that would be largely irrelevant to the proceedings before the NLRB. Similarly, facts concerning the conduct and motivation of the parties during the collective bargaining process, would have no bearing on the state cause of action. Under the analysis of the cases described above, it can be concluded that the risk of interference with the unfair labor practice before the NLRB by maintaining this suit is not substantial.

This conclusion is further bolstered by noting that in the realm of the enforcement of collective bargaining contracts, a union or employee may sue the employer for breaching that contract. Section 301 of the Labor Management Relations Act, 29 USC § 185. It has been held that the suit on the contract may be brought not only in federal court but also in state

courts, *Dowd Box Co* v *Courtney, supra.* As noted by the Illinois Court of Appeals in *Alexander* v *Standard Oil Co,* 53 Ill App 3rd 690, 368 NE 2d 1010, 1014 (1977) *lv den,* a case involving a suit on an individual employment contract in state court:

> The enactment of section 301, however, evinces a clear Congressional intent that regulation of the contractual relationship between employers and union members not be left solely to the NLRB or the "free play" of market forces. Moreover, since Congress has determined that federal or state court adjudication of collectively bargained contract rights does not unduly interfere with a uniform system of labor relations law, then clearly state court adjudication of employer and employee rights under individual contracts cannot be said to present such an impediment to the uniform regulation of collective bargaining as to require federal preemption of state court jurisdiction over these actions. We conclude, therefore, that the individual contracts involved in this case, although closely linked to a collective bargaining agreement between the parties, may be the subject of an enforcement action in state courts.

To summarize, it is apparent that 1) the activity engaged in by defendants is not protected or prohibited activity, 2) that the state does have a cognizable interest in the enforcement of employment contract and 3) since the issues, and facts relevant to their determination, would be essentially different were the case brought before the NLRB, the risk of interference with the unfair labor practice before the NLRB is not substantial. *Sears Roebuck & Co* v *Carpenters, supra.* Accordingly, under the analysis expounded in *Farmers* v *Carpenter, supra* and *Sears Roebuck & Co* v *Carpenters, supra,* the instant action on an alleged oral contract is not pre-empted.

III

Notwithstanding the above, defendants assert that the "right of free collective bargaining, including the right to

economic sanctions, may not be infringed by a state court", because defendants argue, Congress has intended such conduct to be left unregulated, and controlled only by the free play of economic forces. In this respect, defendants principally rely upon *Machinists* v *Wisconsin Employment Relations Commission*, 427 US 132, 49 L Ed 2d 396 (1976), in which the Court held that not only would federal law pre-empt state jurisdiction where the conduct in question is arguably protected by or prohibited by the NLRA, but also where the conduct consists of peaceful economic weapons used in support of bargaining demands. It is asserted by the defendants that their unilateral implementation of minimum performance standards, after a bonafide impasse in the collective bargaining process had occurred, is merely a peaceful economic weapon implicitly authorized by the NLRA by absence of prohibition and, therefore, intended by Congress to be pre-empted from state regulation. Yet the context of the *Machinists* case, and the concurrence of Justice Powell and Chief Justice Burger indicates that its holding is inapplicable to the case at bar.[4]

The case arose out of the enforcement by the Wisconsin Employment Relations Commission of provisions in the Wisconsin statutes addressed to labor relations. The Court noted that the actions of the Commission were "not filling a regulatory void which Congress plainly assumed would not exist . . . Rather, it is clear beyond question that Wisconsin entered into the substantive aspects of the bargaining process . . ." *Id.* at 149, 49 L Ed 2d 396, 408.

The concurrence of Justice Powell and Chief Justice Burger made it clear that the holding of the Court was a limited one,

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[4] It should be noted that the opinion of the Court was a 6-3 decision. Justice Powell and Chief Justice Burger's votes in the opinion of the Court can, therefore, be seen as "swing votes". Their concurring opinion as to the reach of the opinion of the Court, obviously, has special significance.

applicable to those state regulations which directly curtail the use of economic weapons, such as self help:

> I write to make clear my understanding that the Court's opinion does not, however, preclude the States from enforcing, in the context of a labor dispute, 'neutral' state statutes or rules of decision: state laws that are not directed toward altering the bargaining positions of employers or unions but which may have an incidental effect on relative bargaining strength. Except where Congress has specifically provided otherwise, the States generally should remain free to enforce, for example, their law of torts or of contracts, and other laws reflecting neutral public policy. See Cox, Labor Law Preemption Revisited, 85 Harv L Rev 1337, 1355-1356 (1972).
>
> . . . .
>
> State laws should not be regarded as neutral if they reflect an accommodation of the special interests of employers, unions, or the public in areas such as employee self-organization, labor disputes, or collective bargaining.

Id. at 156, 46 L Ed at 412-413.

Indeed the discussion contained in the Court's Opinion echoes Justice Powell's concerns. The Court noted, quoting from Cox, Labor Law Preemption Revisited, 85 Harv L Rev 1337, 1352 (1972)

> An appreciation of the true character of the national labor policy expressed in the NLRA and the LMRA indicates that in providing a legal framework for union organization, collective bargaining, and the conduct of labor disputes, Congress struck a balance of protection, prohibition, and laissez-faire in respect to union organization, collective bargaining, and labor disputes that would be upset if *a state could also enforce statutes or rules of decision resting upon its views concerning accommodation of the same interests.* (emphasis added)

Id. at 139, 49 L Ed at 403.

In the case at bar, the state regulation to be applied, namely the enforcement of an employment contract, does not

directly regulate the concerns of the NLRA such as "employee self organization, labor disputes, or collective bargaining". Although it is true that it may have an incidental effect on the collective bargaining process, the enforcement of an employment contract is essentially neutral in the sense that it does not represent an accommodation or evaluation of the special interests of the parties in collective bargaining. Therefore, it may be concluded that the rule of the *Machinists* case is inapplicable to the case at bar.

Lastly, although defendants have argued that an employer's right to implement unilaterally his last good faith offer is one which Congress intended be unregulated by the States and left to the free play of economic forces, upon careful search for Congressional intent as expressed in the NLRA and LMRA, the Court has been unable to find any expression of this intent. On the contrary, although an employer's right to implement unilaterally his last good faith offer may be somewhat curtailed by the operation of section 8 of the NLRA, *see, BiRite Foods, Inc*, 147 NLRB 59 (1963), yet his right to do so essentially emanates from the common law, entreprenearial right of an employer to run his business. As such, the employer's common law right to implement unilaterally his last good faith offer must be seen as being also limited by an employee's common law right to enforce his contract of employment. Disputes regarding such common law rights of employers and employees ought to be and traditionally have been resolved in State courts.

IV

In conclusion, it may be said that, in the instant case, the individual employment contract rights of the employees have not been totally extinguished by the mere election of a collective bargaining representative or by the commencement of collective bargaining. Further, the enforcement of these rights, will not unduly interfere with the jurisdiction of the NLRB.

Lastly, although it is arguable that the activity complained of is a legitimate economic weapon being used in collective bargaining process, the action in state court affecting it is essentially neutral. Accordingly, for these reasons it must be concluded that the Court's jurisdiction in this case is not pre-empted, and defendants' motion for accelerated judgment ought to be denied.

WILLIAM LEO CAHALAN
William Leo Cahalan, Judge
Third Judicial Circuit

May 28, 1982

A TRUE COPY
JAMES R. KILLEEN
CLERK

By A. JUSTICE
Issuing Clerk

Statute Involved

The relevant provisions of the National Labor Relations Act, as amended, 29 U.S.C. § 151 et seq., are set forth below:

* * *

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * *

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: . . .

* * *

REPRESENTATIVES AND ELECTIONS

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: . . .

* * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (c) . . . If upon [all] *the preponderance of* the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: . . .